Muhamad Fadzli bin Ramli v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL B–Q5–35 OF 1995
MOKHTAR SIDIN, MOHD NOOR AHMAD AND ARIFIN ZAKARIA JJCA
23 JULY 2003

Criminal Law *— Dangerous Drugs Act — s 2 — Definition of cannabis — Canabis as defined under the Act — Whether chemist was referring to cannabis within s 2 of the Act or canbnabis (Indian hemp) under First Schedule of the Act — Dangerous Drugs Act 1952 s 2*

Criminal Law *— Dangerous Drugs Act — s 39B(1)(c) — Trafficking in dangerous drugs — Cannabis — Whether chemist was referring to cannabis or cannabis (Indian Hemp) — Evidence of trafficking not challenged — Whether charge of trafficking proved beyond reasonable doubt — Dangerous Drugs Act 1952 ss 2, 37(da), 39B(1)(c)*

Criminal Procedure *— Defence — Accused remaining silence when defence called — Accused elected to remain silent and call no evidence — Whether trial judge must re-evaluate evidence before convicting accused — Whether failure to re-evaluate evidence fatal — Whether such omission curable where no miscarriage of justice*

Evidence *— Burden of proof — Criminal case — Judge stating prosecution had established 'a prima facie case which, if unrebutted would warrant the conviction of the accused' — Proper standard of proof that of beyond reasonable doubt — Whether conviction of accused on wrong standard of proof fatal*

Two detectives, SP4 and SP5, together with an informant, went to a place in Petaling Jaya where the detectives were introduced to the accused. After negotiations, the accused agreed to sell to the detectives 500 rolls of cannabis. The accused agreed to deliver the goods, at the same place, the following day. On the next day, the detectives proceeded to the agreed place. The accused and another man arrived. The accused was seen carrying a yellow plastic bag. The accused approached SP5 and told SP5 that he had the merchandise. SP5 asked him whether it was correctly counted. SP5 directed the accused to the rear of the car to do the counting. SP4 gave the agreed signal to the other members of the ambush party. The accused tried to run but was caught and arrested. The man who had been with the accused managed to escape. The arresting officer then took possession of the yellow plastic bag from the accused, which was found to contain 487 rolls. These were sent to the chemist (SP1) for analysis. SP1 confirmed that the 487 rolls contained 99.6g of 'cannabis' as defined in the Dangerous Drugs Act 1952 ('the Act'). The accused was charged with trafficking under s 39B(1)(c) of the Act. At the close of prosecution's case, the trial judge came to a finding that the prosecution had succeeded in establishing a prima facie case against the accused, which, if unrebutted, would warrant a conviction. The accused was called upon to enter his defence. The accused elected to remain silent. The accused

was then convicted and sentenced to the mandatory sentence of death. The accused appealed. Counsel for the accused argued, firstly, that the chemist had taken ten random samples to carry out the analysis. He took about one gram of the plant material for the first test and from this he took ten samples. The total weight of the plant material used for this test was not clear. For the second analysis, the chemist only carried out the analysis once and, of the ten samples, he only took 0.1g each. Counsel for the accused contended that the amount used as samples by the chemist for the tests and analyses was inadequate according to the yardstick laid down in *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 (SC). The weight of the samples taken was a far cry from the amount that the court in *Saad bin Mat Takraw & Anor* [1998] 3 MLJ 784 had regarded as being adequate. The chemist had failed to take sufficient samples for analysis and the trial judge had erred in accepting the evidence of the chemist. Counsel for the accused also argued that there was doubt whether the 'cannabis' here was 'cannabis' as defined in s 2 of the Act or 'Indian Hemp' as listed in Part III of the First Schedule to the Act. The chemist seemed unable to make up his mind on this. In the circumstances, the court ought to have given the benefit of the doubt to the accused and amended the charge accordingly. Finally, in evaluating the evidence, at the close of the prosecution case, the trial judge made a finding that he was satisfied, on a maximum evaluation of the prosecution's case, that a prima facie case against the accused had been proved which, if unrebutted would warrant a conviction. Counsel for the accused argued that the trial judge used the wrong standard of proof and had failed to re-evaluate the evidence after the accused had elected to remain silent.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The accused here had been charged with trafficking under s 39B(1)(c) of the Act. The prosecution was not relying on the presumption of trafficking under s 37(da). The trial judge had come to a finding, at the close of the prosecution's case, that, having regard to the fact that the accused who negotiated with SP4 and SP5 for the sale of the cannabis and the accused was carrying the yellow plastic bag containing the cannabis when he was arrested, that a case against the accused had been proved. The conduct of the accused pointed to the fact that he was, at the time of his arrest, trafficking in dangerous drugs. Since the charge against the accused was one under s 39B(1)(c), the amount of the drugs did not matter (see pp 301–302B).

(2) Although the accused in *Abdul Karim* had been charged with an offence under s 39(1)(a) while the accused here was charged under s 39(1)(c), the same principle ought to apply to such offences, whether under s 39(1)(a) or under 39(1)(c) of the Act. The reasoning advanced in *Abdul Karim* ought with equal force

apply to the present case (see p 302B–C); *Abdul Karim bin Pak Kub & Anor v Public Prosecutor* [1997] 2 MLJ 112 followed; *Public Prosecutor v Alex bin Hamzani* [1995] MLJU 150; [1995] 3 CLJ 102 and *Public Prosecutor v Saad bin Mat Takraw & Anor* [1998] 3 MLJ 784 distinguished.

(3) Similarly, whether the 'cannabis' was 'Indian Hemp' or 'cannabis' as defined in s 2 was of no consequence as the accused here was charged with trafficking under s 39B(1)(c). The prosecution was not relying on the presumption of trafficking under s 37(da). This same issue had been canvassed in the case of *Abdul Karim* where the Court of Appeal had ruled that, where the accused is charge for actual trafficking, it made no difference whether the dangerous drug was one defined in s 2 or one listed in the schedule. The consequences would be the same (see pp 302H–303A); *Abdul Karim bin Pak Kub & Anor v Public Prosecutor* [1997] 2 MLJ 112 followed.

(4) This case preceding *Arulpragasan all Sandaraju v Public Prosecutor* [1997] 1 MLJ 1, the correct test to be applied was that in *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265. Thus, at the close of the case for prosecution, the court was to not undertake a minimal evaluation but a maximum evaluation of whether the prosecution had established the charge against the accused beyond all reasonable doubt (see pp 302H–303A).

(5) Considering the finding of the trial judge, he had applied the correct *Khoo Hi Chiang* test. Even though the trial judge initially spoke of a 'prima facie' case, this was qualified by the further statement that 'if unrebutted, it would warrant a conviction'(see p 303C–D).

(6) While the trial judge did not, after the accused had elected to remain silent, go on to re-evaluate the evidence adduced by the prosecution, no substantial miscarriage of justice had occurred in view of the overwhelming evidence against the accused. The Court of Appeal invoked the proviso to s 60 of the Courts of Judicature Act 1964 and upheld the finding of the trial judge (see p 303D–F).

[Bahasa Malaysia summary

Dua orang detektif, SP4 dan SP5, bersama-sama seorang pemberi maklumat, telah pergi ke suatu tempat di Petaling Jaya, di mana detektif tersebut telah diperkenalkan kepada OKT. Setelah berunding, the OKT bersetuju menjual kepada detektif tersebut 500 gulung cannabis. OKT bersetuju membekalkan barangan tersebut, di tempat yang sama, pada keesokan hari. Pada keesokan hari, detektif tersebut telah pergi ke tempat yang dipersetujui. OKT sampai di sana bersama-sama seorang lagi. OKT membawa sebuah beg plastik warna kuning. OKT menghampiri SP5 dan memberitahu SP5 bahawa dia telah membawa barangan tersebut. SP5 bertanya sama ada barangan

tersebut telah dikira dengan betul. SP5 mengarahkan OKT ke bahagian belakang keretanya untuk membuat kiraan. SP4 memberi isyarat yang dipersetujui kepada ahli kumpulan pemerangkap yang lain. OKT cuba melarikan diri tetapi diberkas dan ditahan. Orang yang bersama OKT berjaya melepaskan diri. Pegawai tangkapan telah mengambil milik beg plastik warna kuning dari OKT, yang didapati mengandungi 487 gulung. Ini telah dihantar kepada ahli kimia ('SP1') untuk analisa. SP1 mengesahkan bahawa 487 gulung tersebut mengandungi 99.6g 'cannabis' seperti ditakrifkan dalam Akta Dadah Berbahaya 1952 ('Akta tersebut'). OKT telah didakwa dengan mengedar di bawah s 39B(1)(c) Akta tersebut. Pada penutup kes pendakwaan, hakim perbicaraan telah memutusan bahawa pendakwaan telah berjaya mendirikan suatu kes prima facie terhadap OKT, yang, jika tidak disangkal, akan membawa kepada sabitan ke atasnya. OKT telah dipanggil membuat pembelaannya. OKT memilih supaya berdiam diri. Maka OKT telah disabit kesalahan dan dihukum dengan hukuman mati mandatori. OKT merayu. Peguam bagi pihak OKT berhujah, pertama, bahawa ahli kimia telah mengambil sepuluh sampel secara rambang untuk dianalisa. Beliau telah mengambil lebih kurang satu gram bahan tumbuhan untuk ujian pertamanya dan dari satu gram ini beliau telah mengambil sepuluh sampel. Berat keseluruhan bahan tumbuhan yang digunakan bagi ujian ini adalah tidak jelas. Untuk analisa kedua, ahli kimia hanya membuat analisa sekali dan, dari sepuluh sampel tadi, beliau hanya mengambil 0.1g setiap satu. Peguam bagi pihak OKT mendakwa hitungan berat yang digunakan sebagai sampel oleh ahli kimia bagi ujian dan analisanya tidak memadai sekiranya dibandingkan dengan ukuran yang diberikan dalam kes *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11. Hitungan berat sampel jauh berkurangan dari jumlah yang mahkamah dalam kes *Public Prosecutor v Saad bin Mat Takraw & Anor* [1998] 3 MLJ 784 telah menganggarkan sebagai sesuai. Ahli kimia gagal mengambil sampel yang mencukupi bagi analisa dan hakim perbicaraan terkhilaf dalam menerima keterangan ahli kimia. Peguam bagi pihak OKT juga mendakwa terdapat kekeliruan sama ada 'cannabis' di sini adalah 'cannabis' seperti ditakrifkan di bawah s 2 of Akta ataupun 'Indian Hemp' seperti tersenarai dalam Bahagian III Jadual Pertama kepada Akta tersebut. Ahli kimia nampaknya tidak dapat membuat keputusan mengenainya. Memandangkan sedemikian, mahkamah harus memberikan manfaat keraguan kepada OKT dan meminda dakwaan. Akhirnya, semasa menilai keterangan, pada penutupan kes pendakwaan, hakim perbicaraan telah memutuskan bahawa ia berpuas hati, setelah membuat penilaian maksima kes pendakwaan, bahawa suatu kes prima facie terhadap OKT telah dibuktikan yang, jika tidak disangkal, akan membawa kepada sabitan ke atasnya. Peguam bagi OKT mendakwa hakim perbicaraan telah manggunakan piawai pembuktian yang salah dan gagal membuat penilaian semula keterangan yang diberikan setelah OKT memilih untuk berdiam diri.

Diputuskan, menolak rayuan tersebut dan mengekalkan sabitan dan hukuman: A

(1) OKT di sini telah didakwa mengedar dadah di bawah s 39B(1)(c) Akta tersebut. Pihak pendakwa tidak bergantung kepada anggapan pengedaran di bawah s 37(da). Hakim perbicaraan telah memutuskan, pada penutup kes pendakwaan, bahawa, memandangkan yang OKT telah berunding dengan SP4 dan SP5 bagi penjualan cannabis dan OKT yang telah membawa beg plastik warga kuning yang mengandungi cannabis semasa beliau ditahan, bahawa kes terhadap OKT telah dibuktikan. Kelakuan OKT menunjukkan bahawa beliaulah, semasa penahanannya, yang mengedarkan dadah berbahaya. Memandangkan dakwaan terhadap OKT adalah di bawah s 39B(1)(c), jumlah dadah tidak penting. B C

(2) Walaupun OKT dalam kes *Abdul Karim* telah didakwa dengan suatu kesalahan di bawah s 39(1)(a) walhal OKT di sini didakwa di bawah s 39(1)(c), prinsip yang sama harus terpakai untuk kesalahan sedemikian, sama ada di bawah s 39(1)(a) mahupun di bawah 39(1)(c) Akta tersebut. Alasan yang diberikan dalam kes *Abdul Karim* harus digunakan juga dalam kes ini (lihat ms 302B–C); *Abdul Karim bin Pak Kub & Anor v Public Prosecutor* [1997] 2 MLJ 112 diikut; *Public Prosecutor v Alex bin Hamzani* [1995] MLJU 150; [1995] 3 CLJ 102 dan *Public Prosecutor v Saad bin Mat Takraw & Anor* [1998] 3 MLJ 784 dibeza. D E

(3) Seperti itu juga, sama ada 'cannabis' tersebut adalah 'Indian Hemp' atau 'cannabis' seperti tertakrif di bawah s 2 tidak membawa sebarang kesan memandangkan OKT di sini dituduh dengan pengedaran di bawah s 39B(1)(c). Pihak pendakwa tidak bergantung kepada angappan pengedaran di bawah s 37(da). Isu yang sama ini telah dihujahkan dalam kes *Abdul Karim* di mana Mahkamah Rayuan telah memutuskan bahawa, sekiranya OKT dituduh dengan pengedaran sebenarnya, sama ada dadah berbahaya tersebut ditakrifkan di bawah s 2 ataupun disenaraikan dalam jadual tidak membawa sebarang kesan. Akibatnya adalah sama (lihat ms 302D–F); *Abdul Karim bin Pak Kub & Anor v Public Prosecutor* [1997] 2 MLJ 112 diikut. F G

(4) Kes ini dibicarakan sebelum kes *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1, maka ujian yang perlu digunakan adalah ujian dalam kes *Khoo Hi Chiang v Public Prosecutor & Anor* [1994] 1 MLJ 265. Maka, pada penutup kes pendakwaan, mahkamah tidak harus membuat suau penilaian minima tetapi membuat penilaian maksima sama ada dakwaan terhadap OKT telah dibuktikan melampaui segala keraguan munasabah. H I

(5) Memandangkan keputusan hakim perbicaraan, ia telah menggunakan ujian yang betul iaitu ujian *Khoo Hi Chiang*. Walaupun hakim perbicaraan pada awalnya menyentuh mengenai kes 'prima facie', ini telah dilengkapkan dengan kenyataan seterusnya 'jika tidak disangkal, akan membawa sabitan ke atasnya'.

(6) Walaupun hakim perbicaraan tidak, setelah OKT memilih berdiam diri, terus membuat penilaian semula keterangan yang diberikan pendakwaan, tidak berlaku ketidakadilan yang substantif memandangkan keterangan yang berat terhadap OKT. Mahkamah Rayuan menggunakan proviso kepada s 60 Akta Mahkamah Kehakiman 1964 dan mengekalkan keputusan hakim perbicaraan.]

Notes

For cases on Dangerous Drugs Act 1952 s 2, see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 46–51.

For cases on Dangerous Drugs Act 1952 s 39B(1)(c), see 4 *Mallal's Digest* (4th Ed, 2000 Reissue) para 197.

For cases on the accused remaining silence when defence called, see 5 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1414–1415.

For cases on the burden of proof in criminal cases, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 363–376.

Cases refered to

Abdul Karim bin Pak Kub & Anor v PP [1997] 2 MLJ 112 (folld)
Arulpragasan a/l Sandaraju v Public Prosecutor [1997] 1 MLJ 1(refd)
Khoo Hi Chiang v Public Prosecutor & Anor [1994] 1 MLJ 265(refd)
Leong Bon Huat v PP [1993] 3 MLJ 11 (refd)
PP v Alex bin Hamzani [1995] MLJU 150; [1995] 3 CLJ 102 (distd)
PP v Saad bin Mat Takraw & Anor [1998] 3 MLJ 784 (distd)
Shukri bin Mohamad v PP [1995] 3 MLJ 299 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Dangerous Drugs Act 1952 ss 2, 12(2), 37(da), 39(1)(a), (b), 39B(1)(c), 39B(2), First Schedule Part III

Appeal from: Criminal Trial No 47–31of 1992 (High Court, Shah Alam)

Karpal Singh a/l Ram Singh (*Karpal Singh & Co*) for the appellant.
Nurul Huda Nuraini bte Mohd Nor (Attorney General's Chambers) for the respondent.

Arifin Zakaria JCA (delivering judgment of the court): A

BACKGROUND FACTS

The appellant was charged for an offence of doing an act for the purpose of trafficking in dangerous drug to wit cannabis weighing 99.6g which is an offence under s 39B(1)(c) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2). The appellant was found guilty by the High Court and sentenced to the mandatory sentence of death. He now appeals to this court against both the conviction and sentence. Having heard the submissions of both learned counsel for the appellant and the learned deputy and after having deliberated over the matter we came to a unanimous decision that the appeal is without merit and accordingly we dismissed the appeal and affirmed the conviction and sentence imposed by the High Court. We now give our reasons. B C

The facts leading to the arrest of the appellant are briefly as follows. On 8 May 1992, acting on information, two dectective constables namely Tahat bin Gasmare ('SP4') and Zamul Sabinn bin Abd. Ghani ('SP5') from the Cawangan Anti Dadah, Ibu Pejabat Polis Kontinjen Selangor together with an informer proceeded to the river bank at Kampong Sentosa, 61/2 mile stone, Jalan Kelang Lama, Petaling Jaya. There, the two dectective constables were introduced to the appellant who was known as 'banana'. After negotiation, the appellant agreed to sell to the two detective constables 500 rolls of cannabis at the agreed price of RM1.80 per roll. The appellant then told SP4 and SP5 that he will deliver the same on the following day, ie 9 May1992 at about 8.30pm at the same place. D E

SP4 and SP5 then informed his superior, Chief Inspector Abdul Rahman bin Mansol about the proposed transaction. A plan to arrest the appellant was then conceived. On the day and time in question, SP4 and SP5 proceeded to the place as agreed in a car bearing No JBP 2265 driven by SP5. At about 8.40pm, the appellant and another Malay man appeared on the scene. The appellant was seen carrying a yellow plastic bag ('P5'). He approached SP5 who was seated on the driver's side of the car. He then told SP5 that he had the merchandise in question and SP5 asked him whether it was correctly counted and the appellant replied saying that it can be recounted. SP5 then directed the appellant to go to the rear of the car to do the counting. In the meantime, SP4 gave the agreed signal to the other members of the ambush party. Detective constable Jumiat bin Mohamad Yunnus ('SP3') and constable Haris Fadillah, who were in hiding, then approached the appellant. When SP3 identified himself as a police officer to the appellant, he tried to run, but he was arrested by SP3 and constable Haris. The other Malay man who was with the appellant however, managed to escape. SP3 then took possession of the yellow plastic bag from the appellant, which upon inspection was found to contain 487 rolls suspected to be cannabis. The 487 rolls were then sent to the chemist ('SP1') for analysis. SP1 confirmed that the 487 rolls contain 99.6g 'cannabis' as defined in the Act. F G H I

A At the close of prosecution's case, the learned judge came to a finding that the prosecution had succeeded in establishing a prima facie case against the appellant as charged which if unrebutted would warrant a conviction. The appellant was then called upon to enter his defence. The appellant elected to remain silent. A finding of guilty was then entered and the B appellant was convicted and sentenced to the mandatory sentence of death.

THE GROUNDS OF APPEAL CANVASSED BEFORE US

At the hearing before us, Mr Karpal Singh, learned counsel for the appellant, attacked the finding of the learned judge on three principal C grounds. We shall deal with each of these grounds in the order they were raised before us.

The first ground

Firstly, it was contended that the learned trial judge was wrong in accepting D the evidence of the chemist on the ground that the chemist failed to take sufficient samples of the drug for analysis. In his evidence the chemist stated that he took ten random samples to carry out the Duquenois Levin test ('DLT') and the thin layer chromatography ('TLC') analysis. From the test and analysis, he concluded that the resin found in the plant material contained the active ingredient of cannabis. In cross-examination, he stated E that he took about one gram of the plant material for DLT and for this test he took ten samples. It is, however, not clear from his evidence what was the total weight of the plant material used for the DLT. As for the TLC analysis, he stated that he only carried out the analysis once and of the ten samples he only took 0.1g each. Based on the evidence of the chemist as F summarized above, the learned counsel for the appellant contended that the amount of samples used by the chemist for the chemical test and analysis is inadequate if one were to use the yardstick as laid down by the Supreme Court in *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11. In that case, the accused was charged for trafficking in cannabis weighing 793.85g. The government chemist gave evidence that out of the 793.85g the samples he G took for analysis was 'more than 10% of the net weight of 793.85g' of the plant material. The main ground of appeal in that case was that the testimony of the chemist did not prove beyond any reasonable doubt that the bulk of the dried leaves was cannabis within the meaning of s 2 of the Act. Edgar Joseph Jr SCJ delivering judgement of the court at p 15 observed as follows:

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> It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visul examination, aided no doubt by a microscope. But while the result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s 2 of the Act it was necessary to I take the matter further and establish beyond any reasonable doubt that that was so. This further step would, of necessity, have involved the carrying out of chemical tests on adequate quantities of the plant material.

What would be adequate quantities for this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate, having regard to the total weight of the plant material, for the reasons stated."

The learned counsel further cited the following cases, namely *PP v Alex bin Hamzani* [1995] MLJU 150; [1995] 3 CLJ 102; and *PP v Saad bin Mat Takraw & Anor* [1998) 3 MLJ 784 where the issue of inadequacy of the samples was successfully raised by the defence to rebut the charge of trafficking under s 39B(l)(a) of the Act. In *PP v Saad bin Mat Takraw & Anor*, Vincent Ng J at pp 803 and 804 stated thus:

> With respect, I would readily adopt and agree with the views expressed by Ian Chin J in *PP v Mohammad bin Ambunani* [1994] 4 CLJ 871 and Tee Ah Sing JC (as he then was) in *PP v Alex bin Hamzani* [1995] MLJU 150; [1995] 3 CLJ 102 that not less than 200g of plant material has to be chemically tested in order to prove beyond reasonable doubt that the weight conveyed or possessed of was 200 or more grams of cannabis as defined. It would appear that both decisions were guided by the ratio in *Leong Bon Huat* which, I must add, has not, in any material respect, been overruled by the decision in *Roslim bin Harun v PP* [1994] 2 MLJ 132. Surely, in my opinion, in a capital charge involving a man's life, and hence essentially subject to strict curial scrutiny, it is not too much to require that the chemist carry out chemical tests on not less than the statutory minimum amount required to trigger the presumption under s 37(da), so as to prove beyond reasonable doubt quantitative breach of such statutory minimum. It would follow that only such minimum amount chemically tested could constitute the expression 'adequate quantity' used in *Leong Bon Huat*. With such huge amount of plant material seized in the present case, I fail to understand why, in a charge of this nature, the chemist did not conduct the chemical test on at least 200g of the plant material, which would have been the best evidence adducible; notwithstanding that s 37(j) does not refer to the 'ten per centum' (10%) by weight or quantity of the substance, but rather, by the number of receptacles holding the substance.

Based on the above cited authorities, learned counsel contended that the weight of the samples taken in the present case is a far cry from the amount that the courts in the above cited cases have regarded as being adequate.

However, learned counsel quite frankly conceded that there is the case of *Abdul Karim bin Pak Kub & Anor v PP* [1997] 2 MLJ 112, a decision of this court, which goes against the appellant. In that case the appellants were convicted under s 39B(l)(a) of the Act by the High Court for trafficking in cannabis and sentenced to death. Before the Court of Appeal, it was argued that there was doubt as to what the substance analysed by the chemist because the chemist merely testified that he found the substance to be cannabis as defined under the Act. It was submitted that in the circumstances the cannabis referred to by the chemist could well be

A cannabis (Indian Hemp) as listed in Part III of the First Schedule to the Act. Relying on the decision of the Federal Court in *Shukri bin Mohamad v Public Prosecutor* [1995] 3 MLJ 299, it was urged upon the court to substitute the conviction for that under s 12(2) of the Act. The Court of Appeal rejected the appellants' argument and dismissed their appeal against both conviction and sentence.

B In rejecting the appeal, Shaik Daud JCA delivering judgment of the court stated at p 116 as follows:

> It has not been challenged that the prosecution had adduced evidence of the agent provocateur, admissible uder s 40A of the Act, of the meeting with the
> C appellants, the negotiations for the sale and purchase of the drug, and finally the actual purchase thereof. All this evidence, without doubt, establish the act of trafficking. Trafficking is defined under the Act to include buying, selling, giving, receiving, transporting, carrying, sending, delivering, etc. and once that proved, there is no necessity to invoke the aid of the presumption under s 37(da) of the Act. It cannot be denied that the presumption would only be
> D invoked when there is no evidence whatsoever of actual trafficking, and when the prosecution is solely relying on the evidence of possession, custody or control. In the light of the definition of trafficking under the Act, it would appear that in theory, where there is evidence of actual trafficking, even in one gramme of any dangerous drug, whether defined in s 2 or as listed in the Schedules, it is trafficking under s 39B(1) of the Act. Of course, in practice, it
> E would not be conscionable to charge anyone with trafficking in one gramme of dangerous drug even when there is evidence of actual trafficking. Therefore, on the facts of the present case and in the light of the overwhelming evidence of actual trafficking of the dangerous drug, even though it may well be cannabis (Indian Hemp), the appellants were rightly convicted of
> F trafficking. If the appellants were found to be merely in possession, custody or control of the 3,503g of the drug which, if it rums out to be cannabis (Indian Hemp), then it follows that the presumption under s 37(da) cannot be invoked against them. This is also recognized by the Federal Court in *Shukri*'s case. Even if the construction most favourable to the appellants is taken as to the type of drug in this case, i.e. cannabis (Indian Hemp), in the light of the
> G uncontro verted evidence of actual trafficking, it is our view that they were rightly convicted under s 39B(1)(a) of the Act.

In the present case, the appellant was charged with doing an act for the purpose of trafficking in cannabis weighing 99.6g an offence under s 39B(1)(c) of the Act. At the very inception, it is clear that the prosecution
H was not relying on the presumption of trafficking under s 37(da). At the close of the prosecution's case, the learned judge came to a finding that the prosecution had made out a prima facie case against the appellant as charged having regard to the fact that the appellant was the one who negotiated with SP4 and SP5 for the sale of the cannabis to the them. And on the 9 May 1997, the appellant was carrying the yellow plastic beg
I containing the cannabis when he was arrested by the police. The learned judge held that all these conducts of the appellant point to the fact, as alleged by the prosecution, that the appellant at the time of arrest was doing

an act for the purpose trafficking in dangerous drug, an offence under s 39B(1)(c). We are of the view that the evidence before the court supports the finding made by the learned judge. Since the charge against the appellant is one under s 39B(1)(c), it matters not what the amount of drug was (see *Abdul Karim bin Pak Kub*).

We are conscious of the fact that the appellants in *Abdul Karim bin Pak Kub* were charged with an offence under s 39(1)(a) while the appellant in the present case was charged under s 39(1)(c) of the Act. We are, however, of the view that the same principle ought to apply to both offences under s 39(1)(a) and 39(1)(c) of the Act. On that premise, the reasoning advanced by this court in *Abdul Karim bin Pak Kub* ought with equal force apply to the present case. For the above reasons, we dismissed the first ground raised by the learned counsel in support of this appeal.

The second ground

The second ground advanced by learned counsel for the appellant in support of this appeal is that from the evidence of the chemist there is doubt whether the 'cannabis' here is 'cannabis' as defined in s 2 of the Act or 'Indian Hemp' as listed in Part III of the First Schedule. He submitted that from the testimony of the chemist it would appear that the chemist could not make up his mind on this. In the circumstances, he submitted the court ought to have given the benefit of the doubt in favour of the appellant and amend the charge accordingly. In reply, the learned deputy argued that whether the 'cannabis' here is 'Indian Hemp' or 'cannabis' as defined in s 2 is of no consequence as the appellant here was charged under s 39B(1)(c). The prosecution is not relying on the presumption of trafficking under s 37(da). It is our view that this same issue had been canvassed in the case of *Abdul Karim bin Pak Kub*. In that case, this court ruled that it makes no difference whether the dangerous drug is as defined in s 2 or as listed in the schedule when the accused is charge for actual trafficking in dangerous drug as the consequence would be the same. We wholly agree with the said view. For the above reasons, we rule that the second ground raised by the appellant herein is also devoid of any merit and without any hesitation we dismissed the same.

The third ground

We now turn to the third and final ground raised by the learned counsel for the appellant that is, the failure of the learned trial judge to reevaluate the evidence adduced by the prosecution after the appellant had elected to remain silent. The learned counsel submitted that this case precedes the case of *Arulpragasan all Sandaraju v PP* [1997] 1 MLJ 1, therefore, the correct test would be the test as set out in *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265. In the latter case, Edgar Joseph Jr SCJ stated that at the close of the case for prosecution this court is to undertake not a minimal evaluation of the evidence tendered by the prosecution in order to determine whether nor not the prosecution's case is not inherently

A incredible, ie the *Haw Tua Tau* test, but a maximum evaluation of such evidence to determine whether or not the prosecution had established the charge against the accused beyond all reasonable doubt. In this case the learned trial judge, having evaluated the evidence for the prosecution, at the close of the prosecution case, made the following finding:

B

> Oleh itu saya berpuashati, setelah memberi penilaian maksima kepada keterangan pendakwaan dalam kes ini seperti yang diputuskan dalam kes *Khoo Hi Chiang v PP and another appeal* [1994] 1 MLJ 265 bahawa pendakwaan telah berjaya membuktikan satu kes prima facie terhadap tertuduh yang, jika tidak disangkal, akan membawa kepada sabitan ke atasnya di atas sebab-sebab seperti yang telah diberikan tadi.

C

Considering the finding of the learned judge above, we are of the view that he had applied the correct test as propounded by the Supreme Court in *Khoo Hi Chiang*. Even though the learned judge initially speaks of a 'prima facie' case, it is further qualified by the statement that 'jika tidak disangkal, akan membawa sabitan ke atasnya', which literally translated mean 'if unrebutted would warrant a conviction.'

D

It is no doubt true that the learned judge did not, after the appellant had elected to remain silent, go on to re-evaluate the evidence adduced by the prosecution. The note of proceedings shows that upon the appellant electing to remain silent, the learned judge proceeded to make a finding of guilt against the appellant and convicted and sentence him accordingly. However, having considered the matter we are of the view that no substantial miscarriage of justice had occurred in this case in view of the overwhelming evidence against the appellant. In the circumstances, we invoked the proviso to s 60 of the Courts of Judicature Act 1964 and uphold the finding of the learned judge.

E

F

For the above reasons, we would reject the third and final ground of appeal as put forth by the learned counsel for the appellant.

CONCLUSION

G

In the result, we hold that the learned judge had come to a right decision and for the reasons given above, the appeal by the appellant both against conviction and sentence are hereby dismissed.

Appeal dismissed, conviction and sentence affirmed.

H

Reported by Sivapragasam Kumaran

I